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August 6, 1999

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, D.C. 20554

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Re: Smith Bagley, Inc. Petition for Designation as an Eligible
Telecommunications Carrier Under 47 U.S.C. § 214(e)(6),
CC Docket No. 96-45, DA 99-1331

Dear Ms. Salas:

On behalf of Western Wireless Corporation, I am submitting reply
comments in the proceeding referred to above. Please contact me if you have any
questions.

Respectfully submitted,



David L. Sieradzki
Counsel for Western Wireless
Corporation

Enclosures

cc: Attached service list

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Smith Bagley, Inc.)	CC Docket No. 96-45
Petition for Designation as an)	
Eligible Telecommunications Carrier)	DA 99-1331
Under 47 U.S.C. § 214(e)(6), FCC 97-419)	

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REPLY COMMENTS OF WESTERN WIRELESS CORPORATION

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Dated: August 6, 1999

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EXECUTIVE SUMMARY

In this Reply Western Wireless demonstrates that the public interest favors granting ETC status to commercial mobile radio service ("CMRS") providers offering universal service on Indian reservations. Designating wireless carriers as ETCs on Indian reservations will (i) improve the low telephone penetration rate among Native Americans and spur economic growth on reservations, (ii) encourage direct wireline-wireless competition, and (iii) reinforce the FCC's policy that CMRS providers should be designated as ETCs wherever they satisfy Section 214(e) of the Communications Act.

Western Wireless asks that the Commission explicitly repudiate the opposing commenters' arguments against the Petition. The opponents' arguments either suggest that wireless carriers are somehow less qualified or desirable ETC candidates than are wireline carriers, or they ask that CMRS providers be subjected to additional ETC criteria having no statutory or regulatory basis. The Commission should firmly reject these arguments, which directly violate the pro-competitive principles underlying both the universal service provisions of the Act and the FCC's orders and rules.

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REPLY COMMENTS OF WESTERN WIRELESS CORPORATION

Western Wireless Corporation ("Western Wireless") hereby submits its reply comments on the Smith Bagley, Inc. ("Smith Bagley") Petition for Designation as an Eligible Telecommunications Carrier ("ETC") for its Arizona and New Mexico service areas covering federally reserved Native American lands ("Petition"). 1/

I. THE PUBLIC INTEREST FAVORS GRANTING ETC STATUS TO WIRELESS CARRIERS PROVIDING UNIVERSAL SERVICE ON INDIAN RESERVATIONS.

Western Wireless is a strong proponent of wireless carriers' providing universal service to high-cost, rural, and underserved areas, such as Native American lands. Indeed, Western Wireless recently filed with the Commission its own petition for designation as an ETC, pursuant to Section 214(e)(6) of the

1/ See Public Notice, *Petition of Smith Bagley, Inc. for Designation as an Eligible Telecommunications Carrier*, CC Docket No. 96-45, DA 99-1331 (July 6, 1999).

Communications Act of 1934, as amended, to enable it to provide universal service to the Crow Reservation in Montana. 2/

Western Wireless believes that such petitions give the Commission the opportunity to advance several of its policy goals. First, designating wireless carriers as ETCs on Indian reservations will facilitate the provision of additional basic telephone services at affordable prices on the reservations they seek to serve. This should both improve the appallingly low telephone penetration rate among Native Americans and spur economic growth on the included reservations. 3/ Second, granting ETC status to wireless new entrants in the universal service market will encourage the type of direct wireline-wireless competition which the Commission has long sought. 4/ Furthermore, granting a wireless carrier's ETC petition will put

2/ Western Wireless engaged in a process of consultation with the Crow Nation before submitting an ETC request for the Crow Reservation. See *Petition For Designation as an Eligible Telecommunications Carrier and for Related Waivers to Provide Universal Service to the Crow Reservation in Montana* (filed Aug. 5, 1999) & Attachment A (joint statement of interest between carrier and tribe).

3/ The Commission "has begun to address impediments to deployment and subscribership in unserved and underserved areas[, particularly to] Indians living on reservations and on tribal lands" Public Notice, *Commission Seeks to Promote Universal Service in Tribal Lands and Other Insular Areas*, Report No. 99-32 (released Aug. 5, 1999) (announcing adoption of Further Notice of Proposed Rulemaking in CC Docket No. 96-45).

4/ See, e.g., *Calling Party Pays Service Offering in the Commercial Mobile Radio Services*, WT Docket No. 99-207, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 99-137, ¶¶ 3-4, 20 (released July 7, 1999) *Provision of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 99-141, ¶¶ 5, 10, 12, 15 (released July 7, 1999); *Telephone Number Portability*, 11 FCC Rcd 8352, 8434-8436 (1996).

muscle behind the Commission's affirmations that commercial mobile radio service ("CMRS") providers must be granted ETC status for any service area where they satisfy the requirements of Section 214(e) of the Act. 5/ Therefore, Western Wireless urges the Commission to grant wireless carrier ETC petitions as readily as the Commission has the other Section 214(e)(6) petitions it has considered. 6/

II. THE COMMISSION SHOULD MAKE IT CLEAR THAT THE OPPONENTS' ARGUMENTS AGAINST THE PETITION ARE GROUNDLESS.

The Commission should take this opportunity to put to rest the reprehensible and baseless arguments raised by a number of ILECs opposing the Petition. Some of the same parties (and other ILECs) have raised identical arguments in opposition to Western Wireless's requests for ETC designation before state commissions, 7/ and in a few cases state commissions have adopted those

5/ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, First Report and Order, 12 FCC Rcd 8776, 8858-59, ¶ 145 (1997) ("*Universal Service First Report and Order*") (1997); *Federal-State Joint Board on Universal Service, Access Charge Reform*, Seventh Report and Order and Thirteenth Order on Reconsideration in CC Docket No. 96-45, Fourth Report and Order in CC Docket No. 96-262, and Further Notice of Proposed Rulemaking, FCC 99-119 at ¶¶ 10, 15, 72 (rel. May 28, 1999) ("*Seventh Report and Order*") (same).

6/ *See Designation of Fort Mojave Telecommunications, Inc., et al., as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, 12 FCC Rcd 22947, ¶ 11 (CCB 1998) ("*Fort Mojave*"); *Petition of Saddleback Communications for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act*, 13 FCC Rcd 22433, 22435-36, ¶ 7 (CCB 1998) ("*Saddleback*").

7/ Western Wireless has sought designation as an ETC in Colorado, Kansas, Minnesota, Montana, North Dakota, Nebraska, New Mexico, Nevada, Oklahoma, South Dakota, Texas, Utah, and Wyoming.

approaches. ^{8/} The Commission should make it clear -- in part, for the benefit of state commissions -- that designation of any type of ETC, whether ILEC or CMRS carrier, should be a relatively simple matter. The FCC should not allow incumbents fearing competition to delay the ETC designation process by raising irrelevant claims. Any delay incurred as a result of such arguments is a victory for the monopolist incumbents, and a defeat for consumers hoping to realize the benefits of competitive entry by new providers of basic telephone services.

A. The Commission Must Reject ILECs' Calls To Apply ETC Criteria That Have No Basis In The Statute Or Rules.

As in many of the state proceedings in which Western Wireless has been involved, the ILECs offer up an assortment of putative additional criteria for the Commission to use to reject Smith Bagley's Petition. The Commission should recognize these arguments for the red herrings they are. There is no basis in Section 214(e) of the Act or Section 54.101 of the Commission's rules for the Commission ^{9/} to apply any of these supposed criteria to wireless ETC applicants.

^{8/} See Public Notice, *Western Wireless Corporation Petitions for Preemption of an Order of the South Dakota Public Utilities Commission*, DA 99-1356, CC Docket No. 96-45, Public Notice (CCB rel. July 19, 1999) ("*SD Preemption Public Notice*"); Comments of U S West at Attachment B (transcript of recommendation to reject Western Wireless ETC petition by Oklahoma administrative law judge).

^{9/} Regardless of whether state commissions may consider eligibility criteria beyond those found in the statute and the FCC's rules, see *Texas Office of Public Utility Counsel v. FCC*, ___ F.3d ___, 1999 WL 556461 (5th Cir. July 30, 1999) ("*Texas OPUC v. FCC*"), sec. III.A.2.a., there can be no doubt that the statutory criteria and those found in Section 54.101 of the FCC's rules bind the Commission itself in its consideration of ETC petitions under Section 214(e)(6) of the Act. See, e.g. *Victor Broadcasting, Inc. v. FCC*, 722 F.2d 756, 760 (D.C. Cir. 1983) (in making an adjudicatory determination, it "is necessary . . . that the agency act[] within the

The Commission should rebuff ILECs' attempts to bootstrap various stray terms from Sections 254(b), (c), and (e) into Section 214(e) as criteria for ETC designation. The language that the ILECs cite from Section 214(e)(1) -- that carriers designated as ETCs "shall receive universal service support in accordance with Section 254" -- clearly does not mean that each ETC applicant must satisfy address each and every aspect of Section 254 before it can receive designation. Rather, this language obviously means that the support ETCs receive shall be computed and distributed consistent with the system that the FCC and state commissions establish pursuant to Section 254. There is absolutely no basis for tacking on additional ETC criteria supposedly derived from the language of Section 254.

For example, some ILECs suggest that the Petition should be deferred or denied because "[t]here has been no guidance about what rates a wireless carrier must offer to ensure that its service is 'affordable'" 10/ But "affordability" is not a permissible criterion for ETC designation. The ILECs quote the term "affordable," out of context, from Section 254(b)(1) of the Act. It is patently clear, however, as the Fifth Circuit recently confirmed, that the language in Section 254(b) does not "set[] up specific conditions or requirements," but rather provides overarching policy principles on which the FCC's and state commissions' general universal service

bounds of its statutory and constitutional authority[and] that it [] follow[] its own procedural rules and regulations") (*quoting Miner v. FCC*, 663 F.2d 152 (D.C. Cir. 1980)).

10/ Arizona Telephone Comments at 9; *see also* U S West Comments at 10.

policies are to be based. 11/ Use of an “affordability” criterion, or other similar criteria, would also violate Section 253 of the Act, since neither the FCC nor any state commission has ever adjudged an ILEC’s ETC application on such a basis. 12/

Moreover, the Commission must reject the ILECs’ suggestion that a wireless carrier seeking ETC status must demonstrate that it is financially qualified for such designation. 13/ No financial qualification requirement is provided, or even suggested, by the Act or the FCC’s rules. Moreover, if a carrier cannot meet the financial burden of offering and advertising universal service throughout its service area, it will cease offering and/or advertising the service, and thereby lose its designation as an ETC and its ability to receive support or attract customers. The Commission cannot allow speculation regarding a carrier’s fiscal well-being to become a criteria for ETC status. 14/

11/ *Texas OPUC v. FCC*, section III.A.1.a.i.

12/ Similarly, the Commission should reject calls to impose upon wireless carriers criteria such as “access to advanced services,” “competitive neutrality,” or a generic “public interest” review (apart from that applicable under Section 214(e)(2) in rural telephone company service areas). *Contra* U S West Comments at 8, 10-11.

13/ See U S West Comments at 8-10.

14/ Contrary to U S West’s suppositions, U S West Comments at 7, there is no basis for inquiring whether a wireless petitioner would be “adequate as the sole ETC,” *id.* at 8-10, because no ILEC is going to surrender ETC status. Even if an ILEC took that step, states are required to give any remaining ETC sufficient time to gear up to meet any additional burdens. See 47 U.S.C. § 214(e)(4). In any event, such concerns are more appropriately raised in a proceeding in which an ILEC seeks to relinquish its ETC designation.

In view of the foregoing, “gaps” in a CMRS provider’s wireless coverage areas are no more disqualifying than the fact that ILEC wires do not cover or reach every square inch of a LEC’s study area. Both types of carriers must sometimes construct

B. The Offerings Of New Wireless Entrants *Can* Constitute Universal Service, Contrary To Opponents' Arguments.

Some ILECs attempt to characterize wireless carriers' offerings as something different, foreign to the provision of basic telephone service required of ETCs. The Commission should reject this premise, which runs directly counter to clear statements of federal policy issued over two years ago in the Commission's *Universal Service First Report and Order*. ^{15/} For example, U S West questions how a CMRS provider can furnish universal service in satisfaction of the voice grade access, dual-tone multi-frequency signaling, single party service and E911 requirements of Section 54.101(a). ^{16/} However, the answers to these questions have been settled for quite some time. ^{17/}

The Commission should also reject the ILECs' argument that because Smith Bagley is not *already* providing a universal service offering, it cannot be designated as an ETC. ^{18/} As Western Wireless has shown in a separate, related

additional facilities to reach new customers, and neither the Act nor the FCC contemplates that either should be disqualified from being an ETC on that basis.

^{15/} *Universal Service First Report and Order*, 12 FCC Rcd at 8858 ¶ 145 ("any telecommunications carrier using any technology, *including wireless technology*, is eligible to receive universal service support if it meets the criteria under Section 214(e)(1)") (emphasis added).

^{16/} U S West Comments at 5.

^{17/} See *Universal Service First Report and Order*, 12 FCC Rcd at 8815, ¶ 71 (DTMF); *id.* at 8810, ¶ 62 (single party service); *id.* at 8826-27, ¶¶ 90-91 (emergency service).

^{18/} U S West Comments at 7.

proceeding, 19/ the Commission has made it abundantly clear that Section 214(e)(1) is satisfied where a common carrier offers or will offer, in its service area, each of the services listed in Section 54.101(a), 20/ as does Western Wireless in the areas where it has applied for ETC status. The other side of this coin is that there is no basis for restricting ETC applicants to offering *only* the nine enumerated functionalities in an “unadorned universal service offering.” 21/ Indeed, the Fifth Circuit directly affirmed the Commission’s rejection of an identical argument. 22/

19/ See *SD Preemption Public Notice*, DA 99-1356. Western Wireless filed the Petition for Preemption in response to the order of the South Dakota PUC offered as Attachment A to U S West’s Comments.

20/ *Universal Service First Report and Order*, 12 FCC Rcd at 8853 ¶ 137 (“carrier[s] must meet the section 214(e) criteria as a condition of [] being designated an eligible carrier and *then* must provide the designated services to customers pursuant to the terms of section 214(e) in order to receive support”) (emphasis in original); *Fort Mojave*, 12 FCC Rcd 22947, ¶ 11 (designating petitioners as ETCs where each “offers, *or will be able to offer* all of the services designated for support by the Commission”) (emphasis added).

21/ U S West Comments at 6.

22/ *Texas OPUC v. FCC*, sec. III.A.2.c. Oddly, U S West in this context faults an unnamed CMRS provider for offering a universal service package that includes an “expanded local calling area” and a “high level of mobility.” U S West Comments at 6. However, a competitive ETC may offer as large or as small a local calling area as competitive and marketplace demands compel it to provide, so long as it offers its universal service package to all consumers within its designated service area. Similarly, U S West’s characterization of “a high level of mobility” as a disqualifying “additional feature . . . not authorized by any rule or statute”, *id.*, would mean that CMRS providers would *never* qualify for ETC status, a result at odds with the FCC’s well-established policy. See *supra* at 2-3 & n.4; see also U S West Comments at 2 (conceding that “wireless carriers, like Smith Bagley, are not *per se* ineligible” to be ETCs).

C. There Is No Reason to Delay Granting ETC Status to Wireless Carriers.

The Commission should not be diverted in its task by the opposing commenters' claims that it is somehow "premature" to designate a wireless carrier such as Smith Bagley as an ETC. 23/ Contrary to these arguments, which presume that prospective wireless ETCs should be treated differently from ILEC ETCs, The Commission should make it clear that all ETCs, regardless of the technology they utilize, are subject to the same obligations and entitled to the same benefits. 24/

State commissions have routinely and expeditiously designated as ETCs hundreds of ILECs, as well as a number of competitive entrants, 25/ notwithstanding that a number of fundamental policy issues remain open. Similarly, the

23/ Comments of Arizona Telephone Company ("Arizona Telephone") at 8-9; *accord* Comments of the National Telephone Cooperative Association ("NTCA") at 4-6.

24/ *Universal Service First Report and Order*, 12 FCC Rcd at 8858 ¶ 145; *Seventh Report and Order* at ¶ 15 ("all carriers that provide the supported services, regardless of the technology used, are eligible for designation as an [ETC]"); *contra* Arizona Telephone at 8 (arguing that consideration of Smith Bagley's Petition be deferred because the Commission has not resolved "the obligations and the rights a wireless carrier should have when it is designated as an ETC.").

25/ *See Provision of Universal Service to Telecommunications Consumers*, Case No. 8745, Order No. 73802, 88 Md. PSC 239, 1997 WL 1008436, *3 (1997); *Yelm Telephone Company, et al*, Docket No. UT-970333 (Wash. Utilities and Transportation Commission, effective date Dec. 27, 1997); *Eligible Telecommunications Carriers in Arkansas*, Docket No. 97-326-U (Ark. Public Service Commission, Nov. 7, 1997); *Designation of Eligible Telecommunications Carriers Under Part 54 of Title 47 of the Code of Federal Regulations*, Docket No. 05-TI-162 (Public Service Commission of Wisc., Dec. 23, 1997) ; *All Incumbent Local Exchange Carriers, Sprint PCS, and MGC Communications, Inc., to Designate Eligible Communications Carriers*, Resolution T-16105 (Public Utilities Commission of Calif., Dec. 16, 1997).

FCC has granted ETC status to a number of applicants under Section 214(e)(6). 26/ There is thus not a shred of merit to the opponents' claims that the Commission should not grant Smith Bagley's Petition until it makes a final determination on issues such as the minimum amount of local usage that ETCs must provide. 27/ Whatever requirement the Commission ultimately adopts -- if any -- will apply to *all* carriers designated as ETCs -- wireline and wireless alike. The fact that this issue remains under review by the FCC has not prevented either the FCC or the state commissions from designating ETCs, and should present no impediment to granting the Smith Bagley Petition either. 28/

III. CONCLUSION

In addressing the Smith Bagley Petition, the FCC should clarify that the baseless arguments raised here by the ILECs have no place in ETC designation proceedings. In so doing, the Commission would be appropriately sending a strong message that state commissions could look to for guidance in summarily disposing of such blatantly contrived arguments as those U S West offers. For the foregoing

26/ See, e.g., *Saddleback*, 13 FCC Rcd 22433; *Fort Mojave*, 12 FCC Rcd 22947.

27/ NTCA Comments at 5; Arizona Telephone Comments at 9.

28/ Indeed, for the FCC -- or any state commission -- to delay granting ETC status to a wireless carrier on this basis, while routinely granting ETC status to ILECs, would be a patently discriminatory barrier to entry into the universal service marketplace, in violation of Section 253 of the Act. Similarly, the fact that issues relating to the administration of portability of support are pending before the Commission have no relevance to the Petition. *Contra* NTCA Comments at 5-6; Arizona Telephone Comments at 9.

reasons, and those set forth in Western Wireless' initial Comments, the Commission should grant Smith Bagley's Petition for designation as an ETC in its Arizona and New Mexico service areas in federally reserved Native American lands.

Respectfully submitted,

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August 6, 1999

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